



May 23, 2001

Mr. Jesús Toscano, Jr.  
Administrative Assistant City Attorney  
City of Dallas  
1500 Marilla  
Dallas, Texas 78201

OR2001-2136

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147594.

The City of Dallas (the "city") received a request for three categories of information.<sup>1</sup> Through your original and supplemental brief, you claim that portions of the requested information are excepted from disclosure under section 552.101 of the Government Code in conjunction with Rule 6 of the Federal Rules of Criminal Procedure. We have considered the exception you claim and reviewed the submitted information.

You inform us that with the exception of a requested federal grand jury subpoena, and excepting the redacted portions of the documents which you have submitted to us, the remainder of the requested information, including the documents as redacted, will be provided to the requestor. We assume that you have released that information. In addition, you inform us that you do not possess any of the requested grand jury testimony. We note that a governmental body is not required to obtain information not in its possession. Open Records Decision No. 558 (1990).

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<sup>1</sup>The requestor asked for all forms of communication, sent or received, between or about the City of Dallas (the "city") police chief, assistant city manager, city manager, any member of the city council or any city employee regarding any contact with members of the Federal Bureau of Investigation (the "FBI"), U.S. Representative Eddie Bernice Johnson, the U.S. Attorney's Office of the Northern District of Texas since October 1, 1999 to the date of this request; all "Council Action Request" forms submitted by the department to any city employee since February 29, 2000; and all communications between, to or from any city employee, sent or received regarding the city police chief's involvement in an FBI investigation of Al Lipscomb, his involvement with Caligula XXI, Nick and Dawn Rizo, the city police chief's 1998 grand jury subpoena in the Lipscomb case and the Amarillo trial of Mr. Lipscomb, including but not limited to the city police chief's grand jury testimony and his standing as a witness in the Al Lipscomb trial.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Rule 6(e) of the Federal Rules of Criminal Procedure provides:

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

Fed. R. Crim. P. 6(e)(2).

Rule 6(e)(2), in its prescription of general secrecy, refers to the previous subsection, which provides that "[a]ll proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device." Fed. R. Crim. P. 6(e)(1). In addition, Rule 6(e)(3)(A)(ii) provides that disclosures otherwise prohibited by the general rule of secrecy may be made to "such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney duty to enforce federal criminal law." *See id.* 6(e)(3)(A)(ii).

In the subject request, the subpoena in question is referred to as "Chief Bolton's 1998 grand jury subpoena in the Al Lipscomb case." A reference is also made in the request to "Chief Bolton's standing as a witness in the Al Lipscomb trial." You have not shown that Chief Bolton or any other city or department employee received the subpoena as a result of being among the persons subject to the secrecy rule. *See id.* 6(e)(2), (3). Accordingly, we must conclude that the subpoena did not come into the possession of the city or any of its officials by operation of, or statutory exception to, the secrecy rule, but because a city official was served with that subpoena. *See id.* Moreover, section 6(e)(2) states that no obligation of secrecy may be imposed on any person except in accordance with this rule. *See id.* 6(e)(2). Accordingly, we cannot conclude that Rule 6 of the Federal Rules of Criminal Procedure makes the subpoena confidential.

You also urge that the subpoena is confidential under the holding in *Alexander v. Federal Bureau of Investigation*, 186 F.R.D. 102 (D.D.C. 1998). In that case, a federal district court held that a co-defendant in a suit alleging a violation of privacy interests could not be compelled through discovery motions to turn over copies of grand jury subpoenas. *See id.* at 108. However, we must note that the court in *Alexander* interpreted rule 6(e) within the context of a discovery motion for production, rather than a request for information under the Public Information Act (the "Act"). *See id.* Moreover, authority is split over the question of whether a federal grand jury subpoena is subject to the secrecy provisions of Rule 6(e).

"Rule 6(e) does not provide specific guidance on whether a grand jury's subpoena should be kept secret. Additionally, case law has not consistently stated whether the subpoenas are protected by rule 6(e). District courts still have different opinions about whether grand jury subpoenas should be kept secret." Comptroller General, *More Guidance and Supervision Needed over Federal Grand Jury Proceedings* 10, 14 (Oct. 16, 1980), Fed. R. Crim. P. 6(e), annot. at 43 (West pamphlet 2001). Given the split of authority regarding the secrecy of a federal grand jury subpoena and the Act's mandate to liberally construe the Act in favor of granting a request for information, we cannot conclude that Rule 6(e) makes copies of grand jury subpoenas confidential through section 552.101.

In the same context, you cite Open Records Decision No. 513 (1988) in support of your claim. That decision addressed the applicability of the Public Information Act to information before a state grand jury. *See id.* at 2 (Public Information Act does not apply to information within the actual or constructive possession of the grand jury). However, that decision does not apply to this case because the requested subpoena is not a judicial record held by the grand jury or its agent. *See id.* at 2-3 (when individual or entity acts at the direction of a grand jury as the grand jury's agent, information held or collected by the agent is within the grand jury's constructive possession). Therefore, we must conclude that Open Records Decision No. 513 is inapplicable to this case.

Finally, you have submitted redacted copies of certain documents. You assert that the redacted information contains references to the requested subpoena, and that the information was redacted for the same reasons. You have submitted no unredacted copy to this office. Section 552.301(e)(1)(D) requires a governmental body to submit the requested information or a representative sample of the information if there is a voluminous amount. Section 552.302 of the Government Code provides that failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released, absent a compelling reason to withhold the information. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Because you have not submitted the redacted information, we have no basis for finding it confidential. Thus, we have no choice but to order the redacted information released per section 552.302. Moreover, because the subpoena is not confidential, references to the subpoena are likewise not confidential. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

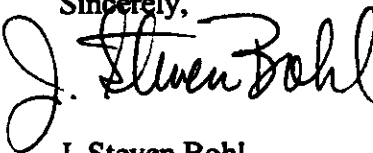
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "J. Steven Bohl". The signature is written in a cursive style with a large, stylized "J" and "B".

J. Steven Bohl  
Assistant Attorney General  
Open Records Division

JSB/sdk

Ref: ID# 147594

Encl: Submitted documents

cc: Mr. Todd Bensman  
c/o Jesús Toscano, Jr.  
Administrative Assistant City Attorney  
City of Dallas  
1500 Marilla  
Dallas, Texas 78201  
(w/o enclosures)